

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Henry M. Hodges No. 4851

Block,

In the Court of Appeals of the District
of Columbia

OCTOBER TERM, 1928

609

UNITED STATES EX REL. AMERICAN SILVER PRODUCERS
ASSOCIATION, A CORPORATION; DELLA S. CONSOLI-
DATED MINES COMPANY, A CORPORATION, AND SPAR
CONSOLIDATED MINES COMPANY, A CORPORATION,
APPELLANTS

v.

ANDREW W. MELLON, SECRETARY OF THE TREASURY,
AND ROBERT J. GRANT, DIRECTOR OF THE MINT,
APPELLEES

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA

BRIEF FOR APPELLEES

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In the Court of Appeals of the District of Columbia

OCTOBER TERM, 1928

No. 4851

UNITED STATES EX REL. AMERICAN SILVER PRODUCERS
Association, a corporation; Della S. Consolidated
Mines Company, a corporation; and Spar Con-
solidated Mines Company, a corporation, appel-
lants

v.

ANDREW W. MELLON, SECRETARY OF THE TREASURY,
and Robert J. Grant, Director of the Mint,
appellees

*APPEAL FROM THE SUPREME COURT OF THE DISTRICT
OF COLUMBIA*

BRIEF FOR APPELLEES

This is an appeal from a judgment (R. 84) of
the Supreme Court of the District of Columbia,
dismissing appellants' petition for a writ of man-
damus against the appellees, who were respond-
ents below (R. 84).

I

1. STATEMENT OF CASE

By this action appellants seek to compel appellees
to purchase for and on behalf of the United States

14,589,730.13 ounces of silver at \$1 per ounce. (R. 10.) The market price of such silver is at least \$6,250,000 less than the \$14,589,730.13 which the Government would have to pay if appellants' petition is granted. (R. 22, 51, 117.) Moreover, this silver is not needed by the Government, and if the Government should be compelled to purchase such an amount, it would mean that more than 14,500,000 ounces of silver would have to be carried at an artificial price for an indefinite period of time. (R. 28, 24.)

Appellants' petition is founded on the proposition that appellees had no authority to issue two orders dated February 11, 1922, and December 19, 1922, whereby they revoked certain allocations of silver from the silver dollar account in the Treasury to the subsidiary silver account in the Treasury and ordered silver to be returned to the silver dollar account equal to the amounts taken therefrom.

At all the times involved or referred to in this case, there were two silver accounts in the United States Treasury: (1) a silver dollar account composed of silver dollars against which silver certificates had been issued, and (2) a subsidiary silver account composed of silver used in coining subsidiary coins (half dollars, quarters, and dimes.) (R. 23, 51.) Prior to the passage of the Pittman Act in 1918, appellees were authorized to purchase silver for subsidiary coinage under the provisions of Sections 3520, 3526, and 3545 of the Revised Statutes. This

authority was in no way affected by the Pittman Act. Until the passage of the Pittman Act, however, there was no authority for purchasing silver for silver dollars, the coinage of such dollars having been completed in 1904 under the Act of July 14, 1890 (26 Stat. 289). (R. 32.)

The Pittman Act was enacted primarily to aid the allies of the United States in the World War. It was a war emergency measure and authorized the melting or breaking up of dollars contained in the silver dollar account in the Treasury and the sale of the resulting bullion. The Act also authorized allocations of dollars for subsidiary coinage as well as for certain other specified purposes, none of which is involved in this case.

This case arises out of five allocations of dollars and silver from the silver dollar account to the subsidiary silver account, and the subsequent revocation of such allocations by appellees by orders dated February 11, 1922, and December 19, 1922. The five allocations were as follows (R. 14, 15, 16, 17):

Silver dollars to be melted down

Date	Mint to which allocated	Value	Ounces
Sept. 7, 1918.....	San Francisco.....	\$1,000,000	772,997.89
Nov. 28, 1919.....	Philadelphia.....	10,000,000	7,734,375.00
Nov. 6, 1920.....	Denver.....	111,168	82,357.24
		11,111,168	8,589,730.13

Silver bullion purchased to replace silver dollars

Date	Mint to which allocated	Ounces
Oct. 18, 1920.....	Philadelphia.....	3,000,000
Dec. 18, 1920.....	do.....	3,000,000

The revocation order of February 11, 1922, related wholly to the two allocations dated October 18, 1920, and December 18, 1920, for 3,000,000 ounces of silver each. (R. 18.) This silver had been purchased under the Pittman Act at \$1 an ounce for the purpose of replacing dollars melted and sold to the British Government. Of the 6,000,000 ounces so allocated, it was found that 4,341,753.61 ounces had not been used in any way and that there was no need for such silver for subsidiary coinage. Of that amount, 1,800,000 ounces had been transferred on the books of the mint from the silver dollar account to the subsidiary silver account, while the remaining 2,541,753.61 ounces had not even been transferred on the books. (R. 18, 30.) Consequently, the allocations of this 4,341,753.61 ounces had resulted in an excess of silver in that amount over and above the requirements for the purpose for which the silver was allocated (see section 2 of Pittman Act), and, therefore, appellee Secretary on February 11, 1922, signed an order revoking the allocations of the 4,341,753.61 ounces of silver. (R. 18.)

The revocation order of December 19, 1922, related to the remaining silver involved in the five

allocation orders referred to above which had not been covered by the revocation order of February 11, 1922 (R. 19). This order was issued by appellee Secretary, on the recommendation of appellee Director and in conformity with an opinion of the Comptroller General of the United States, because it was found (1) that at the time of the allocations of such silver, and at all times thereafter, silver in excess of the amounts so allocated was on hand in the subsidiary silver account of the Treasury and thus, an excess of silver existed over and above the requirements for subsidiary coinage, and (2) that if the allocations were permitted to stand, it would mean that the Government must carry as a dead asset over 10,000,000 ounces of silver and the loss on this amount in interest alone for a period of two years would amount to about \$800,000.

Pursuant to the revocation orders of February 11, 1922, and December 19, 1922, silver was restored to the silver dollar account from the subsidiary silver account in the same amounts as originally taken therefrom and dollars were recoinced from such silver. (R. 29, 32, 33.) The two revocation orders took place at a time when silver purchases to replace silver sold to Great Britain under the Pittman Act were being carried on and actual coinage of silver dollars was under way. (R. 27.)

Both revocation orders of February 11, 1922, and December 19, 1922, were well known to the members of the silver industry generally prior to June 11,

1923 (R. 119), and on June 16, 1923, appellees gave public notice that no further tenders of silver under the Pittman Act would be received as the silver theretofore purchased, amounting to some 200,520,000 ounces, was sufficient to provide for the recoinage of sufficient silver dollars to replace those used under the Pittman Act (R. 47, 48). The purchases of these 200,520,000 ounces of silver had been made at \$1 an ounce from the moneys received from the sales of bullion to Great Britain. The market price of such silver at the time of the purchases was some \$58,000,000 less than the \$200,520,000 paid therefor by the Government. (R. 25, 28.)

Notwithstanding these facts, this suit was not filed until June 1, 1927. (R. 2.) In the interval, the coinage of silver dollars had continued until, at the time of the filing of this suit, all save \$2,000,000 had been recoinage, and at the time of the hearing before the lower court, all of such dollars had been recoinage, the recoinage having been completed in April, 1928. The exact situation appears on pages 71-75 of the Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year ended June 30, 1928, a report required by Statute (Title 5, sec. 262, U. S. Code), the pertinent portions of which are reproduced as an appendix to this brief. In this report the Congress is informed that during the fiscal year 1928 recoinage of silver dollars melted under the terms

of the Pittman Act was completed, and a résumé of the Treasury's silver operations under the Act is given, in which full details concerning the allocations of silver from the silver dollar account to the subsidiary silver account and the subsequent restoration of such silver to the silver dollar account are reported.

Appellants, who were the petitioners below, are (1) American Silver Producers Association, a corporation organized not for pecuniary profit under the laws of Utah on September 16, 1925 (R. 2, 88), (2) Della S. Consolidated Mines Company, a corporation organized under the laws of Colorado on December 12, 1925 (R. 45, 90), and (3) Spar Consolidated Mines Company, a corporation organized under the laws of Colorado on September 24, 1925 (R. 45, 91). Appellant American Silver Producers Association is not alleged to be either the owner or producer of silver, nor is it alleged to be a prospective owner or producer. Appellants Della S. Consolidated Mines Company and Spar Consolidated Mines Company are the owners of mines containing silver ore, which mines are under leases to other companies. The lessees of the mines are not parties to this proceeding, are not listed as members of the American Silver Producers Association, and appear to be operating appellants' properties in conjunction with other properties (R. 93, 96.) None of the members of the American Silver Producers' Association is party to this suit.

Appellants' prayers in this suit are (R. 9, 10) :

* * * * *

2. That the writ of mandamus may issue directed to said respondent, the Secretary of the Treasury, requiring him to cancel the purported revocations contained in the orders of February 11, 1922, and December 19, 1922, hereinbefore described, and requiring him to direct the Director of the Mint to purchase in the United States of the product of mines situate in the United States and of reduction works so located 14,589,730.13 ounces of fine silver at and for the sum of one dollar per ounce.

3. That the writ of mandamus may also issue directed to the respondent, the Director of the Mint, requiring him to purchase in the United States of the product of mines situate in the United States and of reduction works so located 14,589,730.13 ounces of fine silver at and for the sum of one dollar per ounce.

2. STATUTES INVOLVED

The following are the pertinent portions of the statutes involved in this suit:

Act of April 23, 1918, 40 Stat. 535 (*Not reprinted in United States Code*), known as the "Pittman Act":

That the Secretary of the Treasury is hereby authorized from time to time to melt or break up and to sell as bullion not in excess of three hundred and fifty million standard silver dollars now or hereafter held in

the Treasury of the United States. Any silver certificates which may be outstanding against such standard silver dollars so melted or broken up shall be retired at the rate of \$1 face amount of such certificates for each standard silver dollar so melted or broken up. Sales of such bullion shall be made at such prices not less than \$1 per ounce of silver one thousand fine and upon such terms as shall be established from time to time by the Secretary of the Treasury.

SEC. 2. That upon every such sale of bullion from time to time the Secretary of the Treasury shall immediately direct the Director of the Mint to purchase in the United States, of the product of mines situated in the United States and of reduction works so located, an amount of silver equal to three hundred and seventy-one and twenty-five hundredths grains of pure silver in respect of every standard silver dollar so melted or broken up and sold as bullion. Such purchases shall be made in accordance with the then existing regulations of the Mint and at the fixed price of \$1 per ounce of silver one thousand fine, delivered at the option of the Director of the Mint at New York, Philadelphia, Denver, or San Francisco. Such silver so purchased may be resold for any of the purposes hereinafter specified in section three of this act, under rules and regulations to be established by the Secretary of the Treasury, and any excess of such silver so purchased over and above the requirements for such

purposes, shall be coined into standard silver dollars or held for the purpose of such coinage, and silver certificates shall be issued to the amount of such coinage. The net amount of silver so purchased, after making allowance for all resales, shall not exceed at any one time the amount needed to coin an aggregate number of standard silver dollars equal to the aggregate number of standard silver dollars theretofore melted or broken up and sold as bullion under the provisions of this Act, but such purchases of silver shall continue until the net amount of silver, so purchased, after making allowance for all resales, shall be sufficient to coin therefrom an aggregate number of standard silver dollars equal to the aggregate number of standard silver dollars theretofore so melted or broken up and sold as bullion.

SEC. 3. That sales of silver bullion under authority of this Act may be made for the purpose of conserving the existing stock of gold in the United States, of facilitating the settlement in silver of trade balances adverse to the United States, of providing silver for subsidiary coinage and for commercial use, and of assisting foreign governments at war with the enemies of the United States. The allocation of any silver to the Director of the Mint for subsidiary coinage shall, for the purposes of this Act, be regarded as a sale or resale.

SEC. 4. That the Secretary of the Treasury is authorized, from any moneys in the Treasury not otherwise appropriated, to reim-

burse the Treasurer of the United States for the difference between the nominal or face value of all standard silver dollars so melted or broken up and the value of the silver bullion, at \$1 per ounce of silver one thousand fine, resulting from the melting or breaking up of such standard silver dollars.

Section 3520 Revised Statutes; Sec. 328, Title 31, U. S. Code;

Silver bullion for forming into bars.—Any owner of silver bullion may deposit the same at any mint, to be formed into bars, and no deposit of silver for other coinage shall be received. Silver bullion contained in gold deposits, and separated therefrom, may, however, be paid for in silver coin, at such valuation as may be, from time to time, established by the Director of the Mint.

Section 3526 Revised Statutes; Sec. 335, Title 31, U. S. Code;

Purchase of bullion for silver coinage; silver-profit fund.—In order to procure bullion for the silver coinage authorized by this chapter, other than the silver dollar, the superintendents with the approval of the Director of the Mint, as to price, terms, and quantity, shall purchase such bullion with the bullion fund. The gain arising from the coinage of such silver bullion into coin of a nominal value exceeding the cost thereof shall be credited to a special fund denominated the silver-profit fund.

Section 3545 Revised Statutes; Sec. 358, Title 31, U. S. Code;

Payment in money to depositors when value ascertained.—For the purpose of enabling the several mints and assay offices of the United States to make returns to depositors with as little delay as possible, it shall be the duty of the Secretary of the Treasury to keep in such mints and assay offices, when the state of the Treasury will admit thereof, such an amount of public money, or bullion procured for the purpose, as he shall judge convenient and necessary, out of which those who bring bullion to the said mints and assay offices may, under such rules and regulations as may be prescribed by the said Secretary, be paid the value thereof, in coin or bars, as soon as practicable after the value has been ascertained. On payment thereof being made, the bullion so deposited shall become the property of the United States. The Secretary of the Treasury may, however, at any time withdraw the fund or any portion thereof.

QUESTIONS PRESENTED

The case presents itself in two aspects, the first of which was decided by the Court below in dismissing the petition. They are:

1. Do the appellants have a sufficient legal interest to invoke the aid of mandamus?
2. Do the other defenses raised by the appellees bar the appellants' claim to relief by mandamus in any event?

II

SUMMARY OF THE ARGUMENT

Appellees have fully executed the Pittman Act, and the United States has no present need for the silver which appellants seek to compel them to purchase, and if compelled to make such purchases involving over \$14,500,000, will suffer great injury thereby.

I. It is conceded that none of these appellants has any certainty of receiving any benefit if the writ issues, but sue merely in the *hope* that they may do so and for the benefit of all American producers of silver and in behalf of the public at large. This interest is too remote to entitle them to maintain this suit. *United States ex rel. Alsop Process Co. v. Wilson*, 33 App. D. C. 472; *United States ex rel. Stowell v. Deming*, 57 App. D. C. 223; *Hines Yellow Pine Trustee v. United States*, 263 U. S. 148; *Frothingham v. Mellon*, 262 U. S. 447.

II. Appellees were vested with judgment and discretion by the Revised Statutes and the Pittman Act in the matter of providing subsidiary coinage, and the court lacks jurisdiction to review the acts complained of which were discretionary acts. *Dunlap v. Black*, 128 U. S. 40; *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316; *Boynton v. Blaine*, 139 U. S. 306; *Ness v. Fisher*, 223 U. S. 683; *Work v. Rives*, 267 U. S. 175. There were two acts of Congress under which appellees could coin subsidiary coinage, and a decision to proceed under one, even

after a start was made under the other, was a proper exercise of judgment and discretion, the entire matter still being within the Treasury Department, and no rights of others having intervened. *Decatur v. Paulding*, 14 Pet. 497; *Hall v. Payne*, 254 U. S. 343; *Knight v. Lane*, 228 U. S. 7; *West v. Standard Oil Co.*, U. S. Sup. Ct. decided January 8, 1929.

III. The United States is the real party in interest in this suit, the effect of which will be to require appellees, as mere agents of the United States, to make contracts for the United States, and to pay moneys out of the Treasury without a specific appropriation therefor. Neither of these things may be done behind the back of the United States. *United States ex rel. Goldberg v. Daniels*, 231 U. S. 218; *United States ex rel. Wells v. Roper*, 246 U. S. 35; *Reeside v. Walker*, 11 How. 271, Art. 1, Sec. 9, Constitution, Act of June 30, 1906, 34 Stat. 764, section 3678, *Revised Statutes*.

IV. This suit was not brought until four years after the appellees made the revocations complained of. In the interval, all of the silver dollars melted down have been recoinced, and to grant the writ under present conditions would result in great hardship to the Government, would cause large monetary losses to the Government, and would also cause confusion in the fiscal affairs of the United States. Appellants' laches have permitted this change in conditions, and they may not now maintain the suit. *United States ex rel. Arant v. Lane*, 249 U. S. 367;

Gallihier v. Cadwell, 145 U. S. 368; *United States ex rel. Givens v. Work*, 56 App. D. C. 330. The public is not the real party plaintiff, *Crane v. Chicago and Northwestern R. R. Co.*, 74 Ia., 330, 37 U. S. 397; *Northern Pacific R. R. Co. v. Dustin*, 142 U. S. 492, and laches is a proper defense.

V. The writ should be denied in the exercise of the sound judicial discretion of the court to prevent an injury to the public at large. *Morgan v. Howard*, 54 App. D. C. 3, *United States ex rel. Stowell v. Deming*, 57 App. D. C. 223; *United States ex rel. Redfield v. Windom*, 137 U. S. 636; *United States ex rel. Duncan Townsite v. Lane*, 245 U. S. 308; *United States ex rel. Arant v. Lane*, *supra*.

III

APPELLANTS' LACK OF NECESSARY INTEREST

(1) Mandamus is not a writ of right

U. S. ex. rel. Turner v. Fisher, 222 U. S. 204, affirming 33 App. D. C. 195; *People v. Colorado-Central Railroad Company*, 42 Fed. 638. In the latter case the court says at page 640:

The writ of mandamus is no longer a prerogative writ, but it is now regarded as in the nature of an action by the relator against the respondent for the enforcement of a legal right or duty which can not be fully or adequately enforced in any other mode. It is used only to compel action and enforce the performance of a preexisting duty. *One who invokes its powers must show a*

clear legal right to have the act performed and performed in the manner prayed for and by the person or corporation sought to be coerced. Every fact essential to the exercise of the jurisdiction must be distinctly stated, and the relator's right to the relief he seeks must be clearly made to appear by the averments of the petition and alternative writ. It must be made to appear that the writ will be effectual as a remedy, and that the court granting it has the jurisdiction to enforce compliance with its commands. (Italics added.)

That a general interest in the performance of a duty prescribed by statute is not a right sufficient to compel obedience by mandamus or injunction needs no citation of authority.

It is no argument to say, as the appellants do in their brief (p. 29), "If these relators can not bring the action, who can? There is and can be no producer who can say with certainty that the silver would be purchased from him rather than from other producers." The mere fact that no one has a right to the writ, if the relators have not, does not entitle them to its issuance. It may well be that under the facts in this case *no one* has the necessary and required interest. Certainly the fact that no one else could sue does not improve the status of the appellants. *Dunlap v. Black*, 128 U. S. 40; *U. S. ex rel. Ness v. Fisher*, 223 U. S. 683; *U. S. v. Babcock*, 250 U. S. 328.

It is a settled rule of this jurisdiction and of the Federal Courts generally that a relator in order to be entitled to sue for mandamus against executive officers of the United States must show an individual and direct injury, and may not maintain a suit if the interest involved is collateral or remote. *Hines Yellow Pine, Trustee, v. United States*, 263 U. S. 143; *Home Furniture Company v. United States*, 271 U. S. 456; *U. S. v. Los Angeles Railroad*, 273 U. S. 299; *Louisiana v. McAdoo*, 234 U. S. 627. And this is true whether the suit be to enforce a duty owed to the relator as an individual, or one owed to the public at large. *Frothingham v. Mellon*, 262 U. S. 447; *U. S. ex rel. Alsop Process Company v. Wilson*, 33 App. D. C. 472; *U. S. ex rel. Stowell v. Deming*, 57 App. D. C. 223.

(2) The position of the appellants herein

The appellants in this suit fall into two classes: FIRST, the American Silver Producers' Association, "a corporation organized not for profit under the laws of Utah, the objects and purposes of which are to advise, aid, and support legislation and other procedure looking to the lowering of cost of production, reduction, and transportation of silver and an orderly marketing of the same, the elimination of discrimination against the industry, and to subserve, promote, and protect the interests of all those engaged in the production of silver in the United States and elsewhere, and in that behalf to

prosecute any and all lines of activity which may subserve and promote the welfare of the silver mining industry and those engaged therein." (R. 2.) A list of the members of the Association is found in Exhibit A to the petition. (R. 11 et seq.) SECONDLY, the Della S. Consolidated Mining Company and the Spar Consolidated Mining Company, each of which is a corporation and now owns property from which silver may be mined by lessees who operate these properties, paying appellants a royalty upon such silver as the lessees take therefrom. (R. 96.)

None of these appellants was in existence at the times when allocations of silver for subsidiary coinage were made, or when purchases of silver by appellees ceased, said appellants having been incorporated in the year 1925. (R. 45, 88.) If, therefore, purchases of silver had been made at the times when appellants insist that they should have been made, none of these appellants could have benefited thereby, being nonexistent.

The defense of lack of interest in the appellants was raised in appellees' answer (R. 49, 50) and, as was pointed out by the court below (R. 80) must be "encountered upon the threshold of the case," and if this court follows the decision of the lower court it will be unnecessary to consider the other defenses raised by appellees.

(a) The American Silver Producers' Association

The American Silver Producers' Association is "a business league with constituent members." (Appellants' brief, p. 11.) It does not claim to stand in the position of a citizen-taxpayer and even if it did it "as a corporate entity has no interest in duties owing by the Secretary to the public." *U. S. ex rel. Alsop Process Company v. Wilson*, 33 App. D. C. 472. It is organized not for profit, and therefore has no financial interest in the outcome of this suit. It is alleged in its behalf that "throughout the period from May, 1920, to June, 1923, and continuing to the date hereof members of the relator, American Silver Producers' Association, have been and they are now ready, willing, and able to sell" to the appellees "silver the product of mines situate in the United States and of reduction works so located at the price of one dollar per ounce." (R. 9.) It does not itself claim that it has any silver or that its members have any silver which the Secretary of the Treasury may buy. What right then has it to ask for the writ? Is it a self-constituted guardian of law enforcement? Or is it a litigation-agent, filing suit in its own name for the benefit of its constituent members who are not parties of record herein? If the former it has no status in court; if the latter it has no right to the writ. If its constituent members have any rights in the premises, they can sue in their own names and assert those rights. One corporation has no

right to institute proceedings in behalf of another corporation. A corporation must assert its own rights by a suit in its own name. (Fletcher Encyclopedia of Corporations, Vol. 4, p. 4231, and cases cited thereunder.)

If it be contended that the American Silver Producers' Association was organized for the purpose of filing suits for its members, to permit such suits would be contrary to public policy, champertous, and they could not be maintained. Moreover, nothing in the charter of the Association purports to give it the right to file suit for its members whether corporations or individuals.

The American Silver Producers' Association clearly comes within the rule laid down by this court in *U. S. ex. rel. Alsop Process Company v. Wilson*, 33 App. D. C. 472. Therein Mr. Justice Robb said:

The rule permitting private parties whose rights are directly jeopardized to maintain mandamus to compel a public duty is a salutary one, *but it should not be enlarged to such an extent as to permit interference with the operations of the Government by those whose rights are only remotely and indirectly affected.*

(b) The Spar Consolidated and the Della S. companies

The appellants in the second class, the Spar Consolidated and Della S. companies, do not claim that they have any silver which they are ready and willing to sell, if the appellees are compelled to purchase silver, but merely aver that they have suf-

ferred and still suffer great loss and injury by reason of the appellees' failure to purchase "silver bullion as required in the Pittman Act." (R. 9.) The properties of these two companies are in the hands of lessees and if the writ sought should issue tenders of silver to the United States would have to be made, not by the appellants but by the lessees of their mining properties who might or might not be able to furnish silver and who might or might not wish to sell silver to the United States, especially as such lessees appear to have property from which such silver as might be purchased from them might be taken.

The Pittman Act, it will be noted, specifies that silver, purchased pursuant to its provisions, and under regulations to be prescribed by these appellees, be "silver the product of mines situated in the United States and of reduction works so located." It is admitted (appellants' brief, p. 10) that "there is obviously no particular person who can require the respondents to purchase the silver in question from him, or who can demonstrate that if the Act had been carried out the silver would necessarily have been purchased from him." The appellants' position, specifically, is that, notwithstanding the fact that none of them individually or collectively has any interest which has been invaded by the refusal of the appellees to purchase silver, under the circumstances of this case, yet they belong "to a relatively small class of producers for whose 'en-

couragement' the Pittman Act was passed and they are alone affected'' by the alleged failure of the appellees to execute the Act. (Appellants' brief, p. 25.) The class referred to is without legal entity and is necessarily constantly changing as to the persons who compose it, and must embrace not only those who mine silver as a primary occupation but others who secure silver as a by-product in connection with the mining of other ores, and all others whether American citizens or aliens, owning "silver the product of mines situated in the United States and of reduction works so located." The appellants assume to act for this class on the ground that in the past certain companies who are now members of the American Silver Producers' Association, and certain other companies which were acquired in 1925 by the Spar Consolidated and Della S. companies had in the past sold silver to the United States pursuant to the Pittman Act.

The contention that the Act was passed for the encouragement of a "class" for which these appellants assume to sue is founded upon the language appearing in the title of the Pittman Act, as follows:

An Act to conserve the gold supply of the United States; to promote the settlement in silver of trade balances adverse to the United States; to provide silver for subsidiary coinage and for commercial use; to assist foreign governments at war with the enemies of the United States; and *for the*

above purposes to stabilize the price and encourage the production of silver. (Italics supplied.)

The purpose to “stabilize the price and encourage the production of silver,” it will be noted, is not stated to be one of the *primary* purposes of the Act, but is secondary and incidental, since the stabilization of the price and the encouragement of the production of silver is specifically stated to be *for the purposes of conserving the gold supply of the United States; promoting the settlement in silver of adverse trade balances; providing silver for subsidiary coinage, and assisting foreign governments at war with enemies of the United States.* That this was the extent of the intention of the Act, to stabilize the price and encourage the production of silver, appears from Section 3 of the Act, which specifies the purposes for which silver may be used and *omits* any reference to the stabilization of the price or encouragement of the production of silver. The plain inference is that “sales” of silver were not intended to be made merely to give rise to the need to purchase silver to stabilize its price and encourage its production. Appellants concede this in their brief (p. 41), saying “the express purpose of the Pittman Act was to stabilize the price and encourage the production of silver *through and for its other purposes.*” (Italics supplied.) The statute makes no reference to any class or even to American miners or producers but simply provides that silver needed to recoin dollars melted

under the Act shall be purchased "of the product of mines situated in the United States and of reduction works so located." The "encouragement" intended was incidental to the Act and any class which might be encouraged was vague and indefinite indeed, for the Act merely designates the source from which silver necessary to be purchased under the Act should come, *not from whom it should be bought*.

The interest claimed by the appellants in this case is even more remote than the interests claimed in the *Hines case* and the *Alsop case, supra*, in each of which actual and definite injuries were sustained by the relators. Appellants attempt to distinguish the *Alsop case* from this on the ground that this court really should have decided that the respondent in that case had discretion in the matter, and upon the further ground that appellants occupy a position similar to that which would have been occupied in the *Alsop case* by the owner or manufacturer of flour. This court indicated in the *Alsop case* that the owner or manufacturer of flour might have maintained the action. It is obvious that an owner or manufacturer of bleached flour who had been directly and specifically prohibited from making or disposing of flour would in that case have sustained a positive and direct injury, and if the Secretary's regulation was illegal would have been deprived of rights which he was entitled "personally to enjoy". Appellants have no such

rights in this case with respect to the purchases of silver by the United States under the Pittman Act, and their interest is even more remote than that of the Alsop Process Company, and analogous to that of a person who in that case might have expected to bid for the bleached flour or to secure a contract for its manufacture but who had not taken any steps in that respect. Obviously such persons would have had but a remote and indirect interest.

Appellants contend that the case of *U. S. ex. rel. Romero v. Cortelyou*, 26 App. D. C. 298, established the rule that one may sue to enforce a duty owing to the public without showing any direct interest in the duty sought to be enforced or any injury to himself differing from that of other members of the public at large. The ruling of the Supreme Court in the case of *Frothingham v. Mellon* would be a sufficient answer to this if the contention were supported by the *Romero* case. But it is not. In that case there were several relators, all of whom sought to enforce the reestablishment of a post office at Las Vegas, New Mexico. On the matter of interest this court said:

Whether the municipal officers of the town of Las Vegas can maintain this action on behalf of the town or its inhabitants, we need not stop to inquire. Certain of the plaintiffs are private citizens who reside in the said town, and are interested in the maintenance of the post office therein for their own and

the general convenience. If it be the plain duty of the respondent to reestablish the office, then we think it clear, upon principle and authority, that they can maintain the action for the enforcement of that duty. *High Extr. Legal Rem.*, Par. 431; *Union P. R. R. Co. v. Hall*, 91 U. S. 343, 355, 23 L. Ed. 428, 432.

The only meaning to be drawn from this language is that the relators suing for "their own and the public convenience" had such a personal and special interest, because they were inhabitants of the town to be served by the post office, as entitled them to maintain the suit since the post office was to be created for their own personal benefit as well as that of other inhabitants of the town. The town or its inhabitants, obviously a class, were not held to be entitled to maintain the suit. The failure to reestablish the post office was an obvious injury to the individual relators and deprived them of rights which they were entitled "personally to enjoy." *U. S. ex. rel. Alsop Process Company v. Wilson*, *supra*. The *Romero case* was not cited in the opinion of the *Alsop case*, although a prior decision, and does not conflict with the opinion of the court in the *Alsop case*. In the latter opinion this court discussed paragraph 431 of *High on Extraordinary Legal Remedies*, and also the case of *Union Pacific R. R. Co. v. Hall*, 91 U. S. 343, cited in the *Romero case* as the basis for the decision therein, and pointed out that those authorities re-

quired a direct and personal interest on the part of a relator suing on behalf of the public at large. The *Romero case* clearly went no further than the authorities cited. Any doubts on this point are dispelled by the decision of this court in *U. S. ex. rel. Stowell v. Deming, supra*, where a relator, who had suffered no injuries but desired as a citizen to investigate an alleged violation of the Civil Service laws, sought a writ of mandamus to compel the Civil Service Commission to open to him lists of employees on file therein. The court said:

The right alleged by the relator is not *certain, complete and substantial* so as to entitle him to a writ of mandamus. Relator avers that it has been said that the Chief of the Bureau of Efficiency has failed to properly perform his duties, and that relator as a citizen proposes to make an investigation of the subject. Relator's desire for information is not a sufficient basis for a writ of mandamus. Merrill, *Law of Mandamus*, sec. 14; *United States ex rel. Alsop Process Co. v. Wilson*, 33 App. D. C. 472.

In the case of *Smith v. Board of Tax Appeals*, 55 Washington Law Reporter, 374, Mr. Justice Sidons, following the rule laid down in this court, decided a case upon facts essentially identical with the case of *Ayers v. State Auditors*, 42 Mich. 427, cited in appellants' brief (pp. 35, 36, 37), and reached a conclusion directly opposite to the conclusion of the Michigan court. The *Ayers case* is

obviously contrary to the rule prevailing in this jurisdiction.

See also: *U. S. ex rel Ashley v. Roper*, 48 App. D. C. 69, and authorities therein referred to.

(c) Appellants are corporations, and as such are not entitled to writ

The appellants, *as corporations*, are not entitled to sue for the writ of mandamus, in the absence of any special legal interest in the subject-matter of the suit. They have no standing as citizens and taxpayers, and the Court below, after careful consideration found no case where such suits were permitted. (R. 80, 81, 82.) This Court has denied the right.

The relator, as a corporate entity, has no interest in the enforcement of duties owing by the Secretary to the public. *Alsop Case*, 33 App. D. C. 472.

See also, *Northern Pac. R. R. Co., v. Whalen*, 149 U. S. 157.

(3) The interest of the appellants, if there be any interest, is at best a doubtful and technical one

The best that can be said for the claims of the appellants, by stretching every inference in their favor, and reading into the petition matters not alleged, is that they have a doubtful right. Mandamus will not issue to aid such a claim as theirs.

The object of the writ is to enforce the performance of an existing duty, not to create a new one. The office of mandamus is to enforce, not to establish, a legal right. *Stowell v. Deming*, 57 App. D. C. 223.

The obligation must be both peremptory and plainly defined. *McCarty v. U. S. District Court*, from per Curiam opinion of the Circuit Court of Appeals, 19 Fed. 2d. 462.

The writ can not be invoked to aid merely technical rights. *Morgan v. Howard*, 54 App. D. C. 3; *Payne v. U. S.*, 50 App. D. C. 119; and cases cited at 38 C. J. 585.

If there be any doubt as to the sufficiency of the legal interest of the appellants, mandamus should not issue.

Katsh v. Rafferty, 12 Fed. 2d 450.

U. S. v. Basic Prod. Co., 260 Fed. 472.

And see cases cited in 38 C. J. 582.

IV

OTHER CONSIDERATIONS WHICH PREVENT THE ISSUANCE OF THE WRIT

If the Court below erred in its ruling, yet this Court will not reverse the judgment if there are other grounds upon which the judgment can be sustained. The rule is settled that, where judgment must have gone against the plaintiffs on one defense, alleged errors in rulings with reference to other defenses need not be considered.

Lancaster v. Collins, 115 U. S. 222, 227.

West v. Camden, 135 U. S. 507, 521.

Grimes Co. v. Malcolm, 164 U. S. 483.

Aetna Indemnity Co. v. Crowe Co., 154 Fed. 545.

Vagaszki v. Consolidated Coal Co., 225 Fed. 913.

Hornblower v. City of Pierre, 241 Fed. 450.

The whole record in this case is now before this Court, and (Opinion below, R. 83) there are "other questions of great importance" raised by the appellees in their answer, any one of which would justify a refusal of the writ, and which in aggregate present overwhelming reasons for denying the prayers of the appellants' petition.

(2) The acts complained of involved the exercise of judgment and discretion

The answer of the appellees shows that the acts complained of in the petition were done in the discharge of their usual and ordinary official duties, and in the exercise of the discretion vested in them by Sections 3520, 3526, and 3545 of the Revised Statutes, and by the Pittman Act. If this be so the Court will not review those acts.

Decatur v. Paulding, 14 Pet. 518.

Secretary v. McGarrahan, 9 Wall. 298.

Dunlap v. Black, 128 U. S. 40.

Riverside Oil Co. v. Hitchcock, 190 U. S. 316.

Boynton v. Blaine, 139 U. S. 306.

Ness v. Fisher, 223 U. S. 683.

Hall v. Payne, 254 U. S. 343.

Work v. Rives, 267 U. S. 175.

By Sections 3520, 3526, and 3545 of the Revised Statutes the appellees were authorized, as part of their official duties, to procure silver for subsidiary coinage. These sections were enacted long prior

to the Pittman Act, and were not repealed by it. The Pittman Act authorized them, also, to procure silver for subsidiary coinage by melting down silver dollars and using the bullion derived therefrom, or by using the bullion purchased under the Pittman Act itself. The appellees were not *required* by the Pittman Act to obtain silver for subsidiary coinage only in the manner prescribed by that Act and in no other manner; but on the contrary they were merely *authorized* to use the methods therein set forth. The Pittman Act merely supplemented the already existing authority of appellees to procure silver for subsidiary coinage, and left two courses open to them by which to obtain silver for such coinage.

The Pittman Act left to the judgment and discretion of the appellees the matters of making sales (Sec. 1), purchases (Sec. 2), and resales (Sec. 2). This discretion extended not only to determining whether or not any sales or allocations should be made, the amounts thereof, and the times and the terms of the sales, but it also extended throughout the other steps which were to follow in administering the Act. *Purchases of silver were only to be made after sales or allocations had been made*; and since the Secretary of the Treasury admittedly had full control over such sales and allocations he necessarily controlled the purchases of silver which flowed therefrom. If a sale or allocation fell, by revocation or otherwise, it carried away with it the need to purchase dependent thereon.

In addition, the purchase of silver under the Pittman Act involved the exercise of judgment and discretion by the appellees in examining proofs that proffered silver was of the "product of mines situated in the United States and of reduction works so located," and making decisions thereon; in determining the amounts to be purchased and the places of delivery; in making contracts for such purchases; in making regulations relative thereto, and in keeping accounts. After purchases were made the purchased silver was to be coined into dollars in connection with the regular operations of the mints; and such dollars were to be made a part of the monetary system of the country. This involved the retiring by appellee Secretary of Federal reserve notes then in circulation, the issuing of silver certificates against the dollars and placing such certificates in circulation. (Sections 2, 5, and 6.) All of these matters involved the continuous exercise of judgment and discretion, and were left by Congress to the Secretary of the Treasury and the Director of the Mint as part of the ordinary duties pertaining to their offices. Mandamus will not issue in such cases.

Appellants' sole contention is that once the Secretary of the Treasury had made an allocation of silver for subsidiary coinage under the Pittman Act, both the Secretary and the Director of the Mint thereby exhausted the discretion conferred upon them by the Pittman Act and by the

Sections of the Revised Statutes *supra*; that a mandatory duty thereupon devolved upon appellees to make purchases of silver of domestic origin at \$1 per ounce; and that under no circumstances could appellees do anything other than make such purchases.

It is apparent that this is not a case where an executive officer is directed by statute to do certain acts which involve the exercise of judgment and discretion and has refused to proceed at all and in which the aid of the Court is sought merely to compel him to act. *Here the appellees did act, and the petition seeks to have the Court compel them to undo what they have done and to do something else.* (R. 9-10.) Appellees found that the allocations of silver from the silver dollar account to the subsidiary silver account had resulted in an excess of silver in the latter account over and above its requirements. The silver involved in the first revocation order had not been used, part of it had not even been transferred on the books from the silver dollar account to the subsidiary silver account, and no physical transfer had been made of it in any way. As to the silver involved in the second revocation order, it was found that at the times of the allocations affected by such revocation, and at all times thereafter, there was on hand in the subsidiary silver account silver in excess of the amounts allocated. This silver on hand had not been used for subsidiary coinage, and to leave the allocations unrevoked would cause the

Government to carry more than 10,000,000 ounces of silver as a dead asset, the loss on which in interest alone would amount to more than \$800,000 in two years. For this reason the allocations were revoked and silver was restored to the silver dollar account in the same amounts taken therefrom, and the process of coining such silver into dollars proceeded with.

Is there any reason why appellees could not retrace their steps? Appellees contend that there is not.

First, it appears conclusively that the appellees had two courses open to them in furnishing silver to the subsidiary silver account; i. e., they could use silver in the silver dollar account or they could purchase silver under the Revised Statutes. (See *Decatur v. Paulding*, 14 Pet. 518; *U. S. v. Seaman*, 17 How. 225; *Wyman v. Halstead*, 109 U. S. 654.)

Secondly, at the time of the revocations purchases were being made under the Pittman Act and the recoinage of silver dollars was in full swing. The Act was still being administered by the appellees who were exercising the discretion conferred upon them therein. They therefore still had jurisdiction over the subject-matter of the revocations.

Third, it is clearly established that the appellants had acquired no vested rights which were created by the allocations or affected by the revocations. They admit that none of them had any individual right to sell silver which was affected by the revocation orders. Neither did the vague and gen-

eral class of owners of silver of domestic origin have any such right. Appellants made no investments by reason of the allocations or revocations. Neither they nor any producer of silver was any worse off as a result of the revocations than if appellees had never used silver in the silver dollar account for subsidiary coinage, but had from the outset used the silver, acquired under the Revised Statutes, then on hand. And while it is true that the United States was benefited by the acts of the appellees complained of, it is equally true that appellants have not shown and can not show injury to them caused by those acts.

It follows from the above facts that the appellees were authorized to revoke the allocations, and to retrace their steps and proceed under the Revised Statutes. The rule is established that executive officers may revoke their own acts, or acts of their predecessors, so long as the matter has not passed out of the jurisdiction of their department, and no interests have become vested in the persons attacking the revocation.

Stotesbury v. U. S., 146 U. S. 196.

New Orleans v. Paine, 147 U. S. 261.

U. S. ex rel. Knight v. Lane, 228 U. S. 6.

U. S. ex rel. Johnson v. Payne, 253 U. S. 209.

West v. Standard Oil Co. Opinion rendered January 8, 1929, U. S. Supreme Court.

It is submitted that when the appellees found that the allocations of silver from the silver dollar

account to the subsidiary silver account had created an excess of silver in the latter account, and restored such excess to the silver dollar account, they were acting in a reasonable and proper discharge of discretionary powers, committed to them by Congress, over a matter still within their jurisdiction.

It is also submitted that appellants are not asking the court to protect any rights vested in them by law, but are asking that the court seize the hands of executive officers and compel them to execute the ordinary and usual duties of their offices contrary to the judgment and discretion of those officers, solely because, had the court occupied the offices of such officers, the court might have acted differently than did such officers.

(3) This suit is in effect against the United States, which has not consented to be sued by mandamus of its officers, and the courts lack jurisdiction to grant the relief sought

It is well settled that suits seeking the control by the courts of acts of executive officers of the United States may not be maintained where the effect of the suits will be to take or control property of the United States without its expressed consent thereto. *Decatur v. Paulding*, 14 Pet. 518; *United States v. Guthrie*, 17 How. 284; *Minnesota v. Hitchcock*, 185 U. S. 373; *Mississippi v. Durham*, 4 Mackey 235.

(a) Effect of writ would be to compel the making of contracts for
the United States

In spite of appellants' statement that "this is not in any sense a suit against the United States" (Appellants' brief, p. 23), it can not be seriously contended that if the writ be granted in this case, the *United States* will not be compelled to make purchasing contracts. These appellees are parties to this suit solely because of their status as officers of the United States (Appellants' petition, R. 3), and they would act under the writ only as agents of the United States. To purchase the silver as prayed for by the petition would involve an expenditure of \$14,589,730.13 of funds belonging to the United States. The title to the silver purchased would be in the United States.

It seems obvious that the United States is even more vitally interested in the question of whether contracts are to be made which are to bind it to purchase a large amount of silver which its officers say it does not need than it is in the enforcement of contracts already made. Yet in the cases where mandamus has been sought to compel performance of contracts already made, the writ has been denied because the United States "can not be interfered with behind its back, and as it can not be made a party," the suits necessarily must fail. See *United States ex rel. Goldberg v. Daniels*, 231 U. S. 218, which was a suit to compel the Secretary of the Navy to accept an offer for the purchase of a vessel

on the ground that a contract had been made. See also *United States ex rel. Wells v. Roper*, 246 U. S. 335, which was a suit to enjoin the Postmaster General from annulling a contract theretofore made for delivery of the United States mail.

The cases cited on page 24 of appellants' brief in support of their contention that this case does not involve any contract and is not a claim against the United States and therefore that mandamus is the proper remedy, are in no way applicable to this case. In every one of the cases cited, with the exception of *Roberts v. United States*, 176 U. S. 221, there was an act of Congress specifically appropriating and directing the payment of money to a particular person. In those cases the right to the sum appropriated vested immediately upon the passage of the act. In this case appellants admit that none of them has a vested right which was affected by the failure of appellees to purchase the silver involved; and they also admit that the United States does not, out of the facts in this case, owe them or any one else money. These facts clearly distinguish the cases cited from the instant one.

The case of *Roberts v. United States* clearly has no application to the present case. In that case mandamus was brought to compel the Treasurer of the United States to comply with an act of Congress by which he was ordered to sell bonds of the District of Columbia and pay the proceeds of such bonds to the owners, holders, or assignees of certain specific obligations of the District of Columbia.

The act of Congress referred to (Act of August 13, 1894, 28 Stat. 277) provided as follows:

That the Treasurer of the United States *is hereby directed* to pay to the owners, holders or assignees of all Board of Audit certificates *redeemed by him under the Act approved June 16, 1880, the residue of 2.35 per cent per annum of unpaid legal rate interest due* upon said certificates from their date up to the date of approval of said act providing for their redemption. * * *
The Treasurer of the United States *is hereby directed to sell sufficient amount* of the unissued three-sixty-five per cent Bonds of the District of Columbia *to cover the provisions of this Act.* (Italics supplied.)

Roberts had also obtained a judgment of the Court of Claims in his favor, declaring that he was entitled to payment of the obligations referred to which he owned. The *Roberts case*, therefore, involved vested rights, created by statute, in a particular individual. Moreover, the moneys received by the Treasurer from the sale of the bonds were never covered into the Treasury of the United States, were never moneys belonging to the United States, and the United States, as such, had no interest in such moneys. In the present case appellants' petition seeks to compel appellees to *create* obligations of the United States by entering into contracts for it and to take \$14,589,730.13 belonging to the United States out of the United States Treasury to carry out such contracts.

(b) There are no appropriations available for the purchase of silver as prayed for by the petition

The change in conditions and large expenditures which would be necessary to comply with the writ sought in this case will be hereinafter pointed out. The Pittman Act made no appropriation of moneys for the purchase of silver to replace silver used for subsidiary coinage and no other appropriation has been made for that purpose, or out of which the other expenses of complying with the writ sought in this case may be made, and if the writ were issued, appellees would be under the necessity of going to the Congress for an appropriation.

Appellees submit that the effect of the writ would be to require the payment of moneys of the United States, without its assent thereto, and that the United States, as the real party defendant, is entitled to its day in court before judgment be taken against it.

It is well settled that a judgment of a court will not authorize the payment of moneys out of the Treasury of the United States, in the absence of an appropriation. *Reeside v. Walker*, 11 How. 272.

Article 1, Sec. 9 of the *Constitution* provides that no money shall be drawn from the Treasury but in consequence of appropriations made by law, and the Congress has provided:

No Act of Congress shall be construed to make an appropriation out of the Treasury of the United States, or to authorize the execution of a contract involving the payment

of money in excess of appropriations made by law, *unless such Act shall in specific terms declare an appropriation to be made* or that a contract may be executed. (June 30, 1906, c. 3914, Sec. 9, 34 Stat. 764.)

No appropriation of moneys from the Treasury, specific or otherwise, was made by the Pittman Act for the purchase of silver at \$1 an ounce from the product of mines situated in the United States and of reduction works so located to replace silver used in subsidiary coinage. The fact that Congress regarded an appropriation necessary where in carrying out the Pittman Act moneys *in the Treasury* were to be affected, is clearly demonstrated by the fact that Section 4 of the Act authorized the Secretary of the Treasury to reimburse the Treasurer of the United States, from any moneys in the Treasury not otherwise appropriated, on account of the shortage in the Treasurer's accounts occasioned by the difference between the bullion value of dollars when melted down and their face value. This appropriation, of course, could not be used to purchase silver from the American silver producers because the object for which it was made was solely to reimburse the Treasurer for the shortage in his accounts arising out of the difference between the bullion value of dollars when melted down and their face value, and Section 3678 of the Revised Statutes provides:

Except as otherwise provided by law, sums appropriated for the various branches of ex-

penditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.

Appellants point out no appropriations *now* available for the purchase of dollar silver, but contend that the subsidiary coinage to be made from the 14,589,730.13 ounces of silver allocated in 1918, 1919, and 1920, was intended by the Congress to be available for the payment for the silver purchased to replace silver so used. Sensing the dilemma that if payment had actually been made in accordance with this theory the silver producers would have had an astonishing amount of the small change of the United States and that the demands which prompted the making of subsidiary coinage in the first instance would have remained largely unsatisfied by reason thereof, appellants suggest that the matter was purely a bookkeeping one, to be adjusted by "credits." *Just where the 14,589,730.13 dollars actually was to come from is not suggested.*

(4) Appellants are guilty of laches

It is well settled that the question whether mandamus will be granted is to be determined in the light of conditions existing at the time the writ will issue. *See Northern Pacific Railroad v. Dustin*, 142 U. S. 492. In that case the Supreme Court, speaking through Mr. Justice Gray, said:

The question whether a mandamus should issue to protect the interest of the public does not depend upon a state of facts existing when the petition was filed, if that state of

facts has ceased to exist when the final judgment is rendered. In this regard, as observed by Lord Chief Justice Jervis in *Great Western Railway v. The Queen*, already cited, "there is a very great difference between an indictment for not fulfilling a public duty, and a mandamus commanding the party liable to fulfil it." 1 El. & Bl. 878.

It is equally well settled that the laches of a relator will preclude the issuance of the writ of mandamus although a right thereto might be otherwise shown. *United States ex rel. Arant v. Lane*, 249 U. S. 367; *United States ex rel. Givens v. Work*, 56 App. D. C. 330; *Galliher v. Cadwell*, 145 U. S. 368.

In the *Galliher case*, it was said:

But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.

And see *Greylock Mills v. Blair*, 54 App. D. C. 27.

This suit was not filed until June 1, 1927, which was *four* years after purchases of Pittman silver were discontinued by appellees, *four and one-half* years after the date of the last revocation order sought to be canceled by this petition, and at least *four* years after the facts as to the revocations had become known to American silver producers.

During the interval between the revocation orders and the filing of this suit the recoinage of dollars melted down under the Pittman Act, including those allocated to the subsidiary silver account, continued, until at the time of the filing of this suit all but about \$2,000,000 had been recoinage. At the time of the hearing of this case before the lower court, all the dollars melted down under the Pittman Act had been recoinage. It is this change of position on the part of the Government which appellants failed to take cognizance of in their brief. *This change on the part of the Government affects the whole situation.*

The Pittman Act directed that the net amount of silver to be purchased under the Act should not exceed the amount needed to coin the aggregate amount of silver dollars melted or broken up and sold as bullion under the Act. (Section 2.) In other words, the Pittman Act gave authority to appellees to restore to the silver dollar account the same number of dollars as were taken therefrom but *no more*. At the present time appellees have restored to the silver dollar account silver in the amounts taken therefrom, and have coined dollars to the amount of dollars taken therefrom.

If it should be decided that the writ prayed for by the petition in this case should be granted and appellees should be ordered to purchase 14,589,730.13 ounces of silver at \$1 an ounce under the Pittman Act, the question arises as to what shall be done

with such silver. If it is to be coined into dollars, it will first be necessary to melt down 18,863,489 silver dollars heretofore coined, and then to coin the silver purchased under the writ into dollars. Along with these operations, a corresponding amount of silver certificates now outstanding and in circulation would have to be retired, Federal reserve notes would have to be issued, and upon the recoinage of the dollars, the Federal reserve notes would have to be retired and silver certificates would again have to be issued. All this would involve expenses running into thousands of dollars.

If the silver purchased under the writ should not be coined into dollars, the only other courses open would be to (1) hold it as a dead asset in the Treasury Department, or (2) allocate it to the subsidiary silver account for subsidiary coinage. To hold it as a dead asset would be to cause a loss to the Government in interest alone at the rate of four per cent of approximately \$600,000 each year. To allocate it to the subsidiary silver account would be to create an excess of silver in that account which could not possibly be used for at least four years. (R. 34.) Furthermore, the allocation of the silver purchased under the writ to the subsidiary silver account would give a legal basis for another petition by these relators, or by some other relator, claiming that purchases should be made at \$1 an ounce under the Pittman Act to replace the silver so allocated to the subsidiary silver account, and if

appellants' theory is correct, such a duty would exist.

There is no escape from the fact that appellants delayed four and one-half years in bringing this suit, and that the Government's position did change in the meantime. To grant the writ under present conditions would result in great hardship to the Government, would cause large monetary losses to the Government, and would cause confusion in the fiscal affairs of the Government.

Appellants' argument that they have not been guilty of laches is based solely on the proposition that the amount which the Government would have to pay for the silver at the present time would be the same amount it would have had to pay at the dates of the revocation orders, and that the silver purchased under the writ would be coined into dollars having the same value as if such coinage had taken place at the time of the revocations. Appellants' brief ignores completely the real change in the Government's position as above set forth.

In *Arant v. Lane, supra*, the relator was removed from his position as superintendent of a National park and brought suit for the writ of mandamus to compel the Secretary of the Interior to vacate his order of dismissal, and to restore relator to his former office. The suit was not filed until *twenty months* after the dismissal complained of, and in the interval another person had been appointed to the office of Superintendent and had discharged the duties of the office and had received pay therefor.

The Supreme Court of the United States in affirming the decision of this court said:

When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the Government service may be disturbed as little as possible and that two salaries shall not be paid for a single service.

Under circumstances which rendered his return to the service impossible, except under the order of a court, the relator did nothing to effectively assert his claim for reinstatement to office for almost two years. Such a long delay must necessarily result in changes in the branch of the service to which he was attached and in such an accumulation of unearned salary that, when unexplained, the manifest inequity which would result from reinstating him renders the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy.

If the slight injury and inconvenience to the public which it was shown in the *Arant case* would result from the granting of the writ, was sufficient, on grounds of public policy, to constitute changed conditions giving rise to a defense of laches, how much more clearly should the same defense prevail

in this case, where there was a delay of over *four* years and a change in position and conditions which can only be altered by seriously affecting the fiscal affairs of the Government and requiring the expenditure of thousands of dollars upon the suit of parties who, unlike the man deposed from office in the *Arant case*, have never had any real or vested interest in the subject matter of this suit.

The contention that this is a suit to enforce a *public right* and hence that the defense of laches is not available to these appellees, can only proceed upon the theory that the *public* is the real party in interest, and ought not to be prejudiced by delay of its prosecutors in bringing this suit. The injuries offered as a defense to this suit on account of laches *are injuries to the public*, and the use of the name of the United States by these appellants in seeking this writ, can not deprive the public of its right to every defense necessary to protect its interests.

That the suit is not brought in the public interest is easily demonstrable by the *effect*, above shown, which this suit will have upon the public. The question whether the public interest is served by the writ is to be tested by the effect upon the public of the relief sought, and when the effect will be to *injure* the public, the suit will not be held to be in its behalf. *Crane v. Chicago and Northwestern Railway Company*, 74 Ia. 330, 37 S. W. 397; *Northern Pacific R. R. Co. v. Dustin*, *supra*.

It is submitted that the appellants in this case have by their laches lost all right to have the merits of their claims examined by this court.

(5) The results of issuing the writ and the right of this Court to contemplate such results

The Court must look beyond the mere issuing of the writ, "The Court will refuse it, if it be manifest that it must be vain and fruitless, or useless, or can not have a beneficial effect." Tapping, *Mandamus*, p. 67. (Star page, 15.) "* * * It is inconceivable," say the appellants, "that a mandatory duty can be imposed by statute upon executive officers which may be thus disregarded by them with impunity" (i. e., impunity from compulsion by mandamus). P. 29, Appellants' Brief. It may be inconceivable to appellants, but—

It is elementary that the court is not bound to allow the writ merely because the applicant shows a clear legal right for which mandamus would be an appropriate remedy (*Wildwald v. Dodson*, 95 Cal. 450; *Peo. v. Olson*, 215 Ill. 620; *Peo. v. Adams Cty.*, 185 Ill. 288; *Peo. v. Cache River Drain Dist.*, 221 Ill. A. 524; *Peo. v. Brooklyn Bd. Assessors*, 137 N. Y. 201; *Peo. v. Hylan*, 118 Misc. N. Y. 341; aff. 194 N. Y. S. 969; *St. v. Willis*, 19 N. D. 209; *Waddick v. Merrill*, 26 Oh. C. C. 437; *Fawkes v. Burbank*, 188 Cal. 399; *N. Y. Mortg. Co. v. State Sec'y.*, 150 Mich. 197), even though without mandamus the applicant for the writ would be without remedy (*Peo. v. Dowling*, 55 Barbour, N. Y.

197). Even under these circumstances the court may deny the writ where by its issuance the public would be injuriously affected, or where it would operate inequitably upon defendant, or where it would be nugatory or unavailing, or would injuriously affect the rights of third persons, or where there has been laches in seeking the remedy. 38 C. J. 549, citing other cases.

The rule stated above is recognized in the Federal Courts. In the case of *U. S. ex rel. Redfield v. Windom*, 137 U. S. 636, the Supreme Court of the United States says (p. 644) :

It is proper here to remark, *as applicable to the determination of this case*, that, in the extreme caution with which this remedy is applied by the Courts, *there are cases when the writ will not be issued to compel the performance of even a purely ministerial act*. In a case, for instance, where the intention of the officer, though acting within the scope of his duty, had been frustrated by a clerical mistake, *U. S. v. Schurz, supra*; or where the case is one of doubtful right, *N. Y. Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 302; or in a case where the relator having another adequate remedy, the granting of the writ may in this summary proceeding affect the rights of persons who are not parties thereto, or where it will be attended with manifest hardship and difficulties, *People v. Forquer, Breese*, (1 Ill. 68), (2d Ed. 104); *Van Rensselaer v. Sheriff of Albany*, 1 Cowen, 501, 512; *Oakes v. Hill*, 8 Pick. 46.

Mandamus is an extraordinary writ, which is awarded, not as a matter of right, but in the exercise of sound judicial discretion, and, although classed as a legal remedy, is largely controlled by equitable principles. *Katsh v. Rafferty*, 12 Fed. (2d) 450, 453, citing *Ex Parte Skinner & Eddy Corporation*, 265 U. S. 86.

To the same effect are:

U. S. v. Burleson, 49 App. D. C. 26, affirmed, 255 U. S. 407.

Payne v. U. S., 50 App. D. C. 119.

Arant v. Lane, 249 U. S. 367.

Duncan Townsite v. Lane, 245 U. S. 308.

Perry v. Town of Samson, 11 Fed. 2d. 655.

Nor will mandamus issue to accomplish an injustice. *U. S. ex rel. Turner v. Fisher*, 222 U. S. 204, affirming 33 App. D. C. 195.

Nor to compel a futile act: *Ashley v. Roper*, 48 App. D. C. 69; *City of Boulder v. Lewis*, 21 Fed. 2d, 910; *Peo. v. Col. Cent. R. R.*, 42 Fed. 638; *Dancy v. Clark*, 24 App. D. C. 487; Tapping, Mandamus, p. 67; High, Ex. Leg. Rem., p. 15.

Nor to compel continuous acts by respondents where such acts involve the making of contracts which would require the exercise of judgment, discretion, and continuous supervision. *State v. Associated Press*, 159 Mo. 410; 51 L. R. A. 151.

It reposes in the discretion of the court to refuse the writ, and to consider, as grounds for such refusal, the necessary results of issuing the writ.

The facts in this case demonstrate that the results of issuing the writ will be these:

(a) If possible of performance, compliance with the writ would put an added and unnecessary burden upon taxpayers. It would mean the purchase of 14,589,730.13 ounces of silver at \$1 per ounce. It would mean that \$1 would be paid for silver which could be purchased in the market for approximately 55 cents an ounce.

(b) If possible of performance, compliance with the writ would mean the purchase of 14,589,730.13 ounces of silver which the Government does not need and can not use, and the loss of tremendous sums in interest.

(c) If possible of performance, compliance with the writ would turn back the machinery of the Treasury Department, by means of which the silver accounts were handled, after more than four years and cause great confusion in the fiscal affairs of the Nation.

(d) If possible of performance, compliance with the writ would require a series of continuous acts on the part of the appellees, extending over an unknown period.

(e) If possible of performance, the writ would be futile to aid appellants. No benefit can be shown to result to appellants, since it is not shown that they have any silver now or will have any in the future; and since if they should have, appellees need not purchase from them.

V. CONCLUSION

This suit is one by volunteer public prosecutors who have sustained no injuries, and who seek the review and revision by the court of administrative acts of executive officers done in the exercise of judgment and discretion for the benefit of the public at large, and is brought after four years' delay. If successful the suit will result in great injury to the public and to the United States which is not a party hereto, without any certain or probable benefits to the appellants.

Every consideration which has in the past actuated courts in granting mandamus is opposed to the granting of the writ in this case. The court below properly dismissed the petition, and its decision should be affirmed.

Respectfully submitted,

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E. J. CUNNINGHAM,
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APPENDIX

Pages 71 to 75, inclusive, of Annual Report of Secretary of the Treasury for Fiscal Year Ended June 30, 1928, are as follows:

SILVER TRANSACTIONS UNDER THE ACT OF APRIL 23, 1918, KNOWN AS THE PITTMAN ACT

During the fiscal year 1928, recoinage of the silver dollars, melted under the terms of the Pittman Act, was completed. A résumé of the Treasury's silver operations under this act follows:

THE PITTMAN ACT

The act of April 23, 1918, was entitled "An act to conserve the gold supply of the United States; to permit the settlement in silver of trade balances adverse to the United States; to provide silver for subsidiary coinage and for commercial use; to assist foreign governments at war with the enemies of the United States; and for the above purposes to stabilize the price and encourage the production of silver." At the time of the passage of the act Great Britain was in urgent need of the precious metals for use in India. The only possible source of sufficient silver to meet the war emergency was the United States Treasury stock of silver dollars. Congress, therefore, passed the act of April 23, 1918, which authorized the melting or breaking up and sale as bullion of not to exceed 350,000,000 silver dollars from the large stock of silver dollars in

the United States Treasury. The act also authorized the use of silver dollars and of silver purchased under the act for the manufacture of domestic subsidiary silver coins (halves, quarters, and dimes); the sale of silver bullion for commercial use and for conserving the gold supply of the United States and permitting the settlement in silver of trade balances adverse to the United States. Provisions also were made in the act for the retirement of a corresponding amount of silver certificates outstanding against the silver dollars melted; for the issuance of Federal reserve bank notes to prevent contraction of the currency on account of the retirement of silver certificates; for the purchase of domestically produced silver at the fixed price of \$1 per ounce; for the recoinage of the dollars melted; and, upon recoinage, for the retirement of the Federal reserve bank notes.

SILVER DOLLARS MELTED

Melting of silver dollars was commenced immediately after the act was passed, and was vigorously prosecuted at the Philadelphia and San Francisco Mints and at the New York Assay Office, until in May, 1919, 259,121,554 silver dollars had been melted and the 200,032,325.64 fine ounces of bullion resulting therefrom had been sold to Great Britain. The bullion was sold to Great Britain at \$1 per fine ounce, plus a charge estimated to cover the cost of melting, recoinage, and other incidentals, with the intent that the United States Government should neither gain nor lose by the transaction. In addition to the 259,121,554 silver dollars so melted and sold to Great Britain, 11,111,168 silver dollars were melted and assigned for subsidiary silver coinage.

However, this transaction was subsequently canceled, and the silver dollars so melted were replaced with silver dollars coined from silver in kind. There follows a statement showing in detail the number of dollars melted:

Amounts and sources of dollars converted into bullion for sale to Great Britain

Item	Philadelphia Mint	San Francisco Mint	New York Assay Office	Total
Sources of coin converted to bullion:				
Mint stock.....	\$58,534,554.00	\$39,001,000.00	-----	\$97,535,554.00
Transferred from Treasury at Washington.....	87,686,000.00	25,000,000.00	-----	112,686,000.00
Transferred from subtreasury at New York.....	-----	-----	\$26,500,000.00	26,500,000.00
Transferred from New Orleans Mint.....	12,400,000.00	10,000,000.00	-----	22,400,000.00
Face value of dollars converted for sale.....	158,620,554.00	74,001,000.00	26,500,000.00	259,121,554.00
Fine ounces sold the British Government at \$1 per ounce.....	122,527,558.54	57,176,287.40	20,328,479.70	200,032,325.64
Loss by conversion and sale.....	-----	-----	-----	59,089,228.36

Weight and value of 11,111,168 silver dollars assigned for subsidiary coinage and the mints to which they were assigned

	Fine ounces	Face value
September, 1918, San Francisco Mint (uncirculated coin at \$1 per fine ounce).....	772,997.89	\$1,000,000
November, 1919, Philadelphia Mint (uncirculated coin at face value, \$1.29 per fine ounce).....	7,734,375.00	10,000,000
November, 1920, Denver Mint (circulated coin at \$1.29 per fine ounce).....	82,357.24	111,168
Total.....	8,589,730.13	11,111,168

The total number of silver dollars melted, including the 11,111,168 assigned for subsidiary coinage, was 270,232,722. Many of the dollars melted had been in circulation and had become reduced below legal weight by abrasion, and an appropriation to cover this loss was made in the act of April 23, 1918.

PURCHASE OF SILVER BULLION

The purchase of domestically produced silver bullion for replacing the silver dollars converted to bullion and sold to Great Britain was commenced in May, 1920, and all purchases of silver required to replace the silver dollars so sold were completed in June, 1923, with the exception of about 190,000 ounces representing incomplete deliveries of amounts accepted up to June, 1923. Deliveries on account of the 190,000 ounces were completed in July, 1927. The quantity of silver required for recoinng 259,121,554 silver dollars of exact legal silver content, disregarding the question of operative losses, was 200,414,327.07 fine ounces. Monthly receipts of purchased silver by the mint service institutions during the 3-year period from May, 1920, to June, 1923, averaged approximately 5,000,000 ounces, the purchases absorbing practically the entire silver production of the United States for this period. These purchases were made at the fixed price of \$1 per fine ounce, while the market rate during this time was usually below 70 cents.

In October and December, 1920, a total of 6,000,000 fine ounces of silver bullion purchased under section 2 of the act of April 23, 1918, were assigned to the subsidiary coinage account of the Philadelphia Mint for subsidiary coinage. However, 4,341,753.61 ounces of this silver was not used for that purpose, and the orders assigning that amount for subsidiary coinage were revoked in February,

1922, and the silver bullion was restored to the Pittman silver account. The order covering the balance of the 6,000,000 ounces of bullion, that is, 1,658,246.39 ounces, and also the order assigning 11,111,168 silver dollars to the Director of the Mint for conversion into subsidiary silver coins were revoked in December, 1922, on the authority of a decision of the Comptroller General of the United States, dated November 29, 1922, which was subsequently affirmed by him in his ruling of September 4, 1923, addressed to Hon. Key Pittman, vice chairman of the Senate Committee of Gold and Silver Inquiry. (See Exhibits 41 and 42, pp. 341 and 345.)

When the 11,111,168 silver dollars and the 6,000,000 ounces of silver bullion referred to were assigned to the subsidiary coinage accounts, and at all times during the period that this silver was so assigned, there was on hand in the mint service institutions, in the subsidiary silver accounts of the mint service, a sufficient quantity of silver bullion procured for subsidiary coin manufacture to take care of the subsidiary coinage requirements of the Government. At the time of such assignments the bullion was either not located in the institutions where required for use or it was in an unrefined state, although, as stated, there was a sufficient quantity on hand in the subsidiary coinage accounts. By canceling the orders assigning the 11,111,168 silver dollars and the 1,658,246.39 ounces

of bullion for subsidiary coinage the Government avoided purchasing more silver than was actually needed for subsidiary coinage and for carrying out the provisions of the Pittman Act.

RECOINAGE

Recoinage of the 270,232,722 silver dollars melted, which amount includes the 11,111,168 silver dollars assigned for subsidiary coinage, was completed in April, 1928. Such recoinage was begun in February, 1921, which was as soon as postwar demands for other coins that were in active circulation permitted, and continued whenever the mint facilities were available for the purpose until April, 1928, when, as stated, all of the silver dollars melted had been recoined. The currency situation is now the same as before the passage of the act of April 23, 1918, so far as operations under that act are concerned, and the monetary stock of United States silver dollars was neither decreased nor increased by that act.

The cost of coining (recoining) silver dollars is approximately \$10 per thousand. A table showing the recoinage by fiscal years of silver dollars under the act of April 23, 1918, follows:

Fiscal year:	Silver dollars recoined	Fiscal year:	Silver dollars recoined
1921_____	\$19, 043, 000	1926_____	\$11, 432, 700
1922_____	92, 388, 473	1927_____	4, 456, 900
1923_____	110, 715, 000	1928_____	2, 018, 649
1924_____	11, 870, 000		
1925_____	18, 308, 000	Total_____	270, 232, 722